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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 964

In The Matter of:
THE DANIA CORPORATION
INTER NATIONAL BANK OF MIAMI,
Petitioner,

vs.

J. H. BROCK, Trustee and the
DANIA CORPORATION, Debtor,
Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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Petitioner, Inter National Bank of Miami, prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on September 17, 1968.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, printed in the Appendix hereto, infra,

pp. 1-9, is reported at 400 F.2d 833. The order of the United States District Court for the Southern District of Florida is printed in said Appendix pp. 9-21, and was not reported.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its judgment in this cause on September 17, 1968. On October 18, 1968, the Court of Appeals granted Petitioner's application to file a petition for re-hearing out of time and on October 28, 1968, denied Petitioner's petition for re-hearing. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

In a proceeding under Chapter X of the Bankruptcy Act, may a district court authorize the sale of the debtor's sole asset when no plan for reorganization has been filed, the court has not found the existence of an "emergency" necessitating the sale and the value of the asset has not been determined?

STATUTES INVOLVED

The statutory provision involved is sub-section (3), Section 116 of the Bankruptcy Act, 52 Stat. 883, 11 U.S.C. 516 (3). Section 116 provides as follows:

> "Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties in this chapter conferred and imposed upon him and the court—

(3) authorize a receiver or a trustee or a debtor in possession, upon such notice as the judge may prescribe and upon cause shown, to lease or sell any property of the debtor, whether real or personal, upon such terms and conditions as the judge may approve . . ."

STATEMENT

The jurisdiction of the district court was invoked when petitions for reorganization were filed under the Bankruptcy Act, 52 Stat. 883-905, 11 U.S.C. Sections 501-676.

Synopsis: The sole asset of a debtor in reorganization, purchased for in excess of $4,000,000, was the majority interest in the stock of a bank in the south Florida area. The district court approved the sale of that stock to a former owner of same, who was a creditor in the reorganization proceeding. At the time of the sale, no plan for reorganization had been submitted, no emergency existed imperiling the asset and its value had not been determined. These facts are established in detail by the following matters of record.

On January 25, 1966, The Dania Corporation filed a petition for reorganization under Chapter X of the Bankruptcy Act. (R. 9-22). Petitions under Chapter X were also filed on the same date by The Wingreen Company and The Lake Worth Company. (R. 296). All three cases were ordered consolidated in that, inter alia, the corporations had common officers and directors and their operations had been interwoven. (R. 23-24, 296-309). The

three petitions for re-organization were found to have been filed in good faith and were approved. (R. 309-331).

The Dania Corporation had been formed by the principals of The Wingreen Company for the purpose of extending the latter's diversified interests into the banking field. (R. 269, 316). "[T]o own, hold, manage and control 174,893 shares of the common stock of The Dania Bank of Dania, Florida" was the "nature of [its] business." (R. 10)

Prior to filing its petition for reorganization, The Dania Corporation had acquired the above stated shares of stock. Included therein were 124,560 shares of stock acquired by securing the rights thereto of one Nolan C. Aspinwall under a contract between the latter and one Garvice D. Kincaid. (R. 270). The acquisition cost of said shares, including expenses, approximated $4,180,000.00. (R. 20). Between the time that it purchased said shares and the filing of its petition, The Dania Corporation had pledged the shares to two banks to secure loans in the principal amount of $2,975,000.00 (R. 458). The proceeds of those loans had been used to refinance the purchase from Kincaid through Aspinwall. (R. 271-89).

In July, 1965, The Wingreen Company borrowed $100,000.00 from petitioner, Inter National Bank of Miami (hereinafter, "Inter National Bank") (R. 488-93). The Dania Corporation pledged 4,680 shares of stock of The Dania Bank as security for said loan and executed an hypothecation agreement in connection therewith. (R. 494-508). The loan to The Wingreen Company was thereafter renewed. (R. 510-511).

J. H. Brock, as receiver of The Dania Corporation (and The Wingreen Company) reported to the district court in April, 1966 (R. 84) that the value of the debtor's property, to the extent that it was set out in his report, "would be reflected by the adjusted books of the debtors which would represent the cash investment, including loans, contracts, leases, etc. which the debtors or the joining companies acquired or expended." (R. 88) All 174,893 shares of The Dania Bank stock owned by The Dania Corporation were valued at approximately $5,800,000.00 (R. 290). In July, 1966, J. H. Brock, as Trustee, (R. 335) placed the same valuation on said stock with the following notation: (R. 346-47)

> "*NOTE*: The value of The Dania Bank stock was not established by computation of book value or by market value on a bid and asked basis. It was established in accordance with the records of the Debtor, The Dania Corporation, as to its actual expenditure or contracting to pay to acquire said stock, plus the interest actually paid by The Dania Corporation on the unpaid balances involved. The interest payments were credited where they were actually paid by The Dania Corporation, or where the Dania Corporation borrowed monies to pay the same to the collateral lienholders involved. No consideration was given in evaluating the stock to the sum of $43,723.24 which represented dividends paid to J. H. Brock, Receiver of The Dania Corporation, on March 18, 1966, and subsequently transferred to the Trustee."

He also suggested that The Dania Corporation's stock holdings be "liquidated." (R. 357).

On January 3, 1967, the Trustee advised the district court of his intention "to liquidate the Trustee's interest in all of the assets . . ." of The Dania Corporation. (R. 367) His proposals were as follows:

1. With reference to 124,560 shares of Dania Bank stock, they were to be sold to Investment Securities Corporation, Garvice D. Kincaid, President, under the following terms: (R. 367-68, 393-400, 470-76)

a. $75,000.00 cash would be paid to The Dania Corporation;

b. The purchaser would acquire said shares subject to liens of The Florida National Bank and Trust Company of Jacksonville, Florida and The Citizens National Bank of Orlando, Florida, which liens represented security for loans made by said banks in the amount of $2,975,000.00 principal, $3,144,000.00 principal and interest as of December 30, 1966.

c. The shares would be acquired subject to a second lien thereon of Garvice D. Kincaid, as agent for Lexington Finance Company, and Lexington Finance Company, which lien represented security for an obligation in the principal amount of $737,059.17, $779,440.07, principal and interest as of December 30, 1966.

d. Garvice D. Kincaid, as agent and nominee for Lexington Finance Company, would execute releases

directed to claims against the Trustee, including a claim to $31,140.00, which represented a dividend previously paid by The Dania Bank and which was being held by the Trustee.

e. Garvice D. Kincaid, as agent and nominee for Lexington Finance Company, and Lexington Finance Company were to withdraw claims previously filed against The Dania Corporation, and three appeals previously taken by the said Kincaid and Lexington from orders entered in the re-organization proceedings were to be dismissed.

f. The Trustee was to execute releases as to any claims, liens, pledges or causes of action of The Dania Corporation and The Wingreen Company with respect to the stock to be purchased, and against Garvice D. Kincaid, individually and as agent for Lexington Finance Company, and The Lexington Finance Company.

g. The sale was to be subject only to the above-stated liens and encumbrances—"free and clear" of any other liens, encumbrances or claims,—and was contingent upon the entry of appropriate orders by the district court, the approval of the Commissioner of Banking of the State of Florida and the execution of necessary instruments.

2. With reference to the remaining 50,333 shares of stock of The Dania Bank owned by The Dania Corporation, which had been pledged to secure various loan obligations, including the loan made by Inter National Bank, to The Wingreen Company, the trustee petitioned the dis-

trict court for entry of an order directing, inter alia, Inter National Bank to show cause why the court should not enter an order permitting the rejection of "executory contracts" involving it (and two other parties) and The Dania Corporation. (R. 405-21). The contract to which said petition referred, with reference to Inter National Bank, was the agreement whereby The Dania Corporation had pledged 4,680 shares of stock of The Dania Bank to secure the above-mentioned loan made by Inter National Bank to The Wingreen Company.

3. In connection with both of the foregoing proposals, the trustee petitioned the court for entry of a rule to show cause why the court should not declare no equity available for distribution to any stockholders of The Dania Corporation. (R. 381-84).

After issuance of the rules to show cause in accordance with the foregoing petitions of the trustee, (R. 384-93, 401-04) and the filing of responses thereto by petitioner (R. 425-33, 477-511) the district court, after hearing, (R. 513-30) entered the following orders:

1. "[T]here is no equity available for distribution to any and all stockholders or any parties seeking to enforce collateral rights on said stockholders interest in The Dania Corporation." (R. 440-45)

2. The trustee was authorized to reject "executory contracts" between The Dania Corporation, Inter National Bank and two other parties; (R. 436-40, 445-55) and

3. The court confirmed the sale of 124,560 shares of stock of The Dania Bank in accordance with the Trustee's petition. (R. 455-69)

At the time that the district court entered the foregoing orders, no plan for re-organization had been filed. The shares of stock of The Dania Bank—the "sole and remaining asset of The Dania Corporation" (R. 461)—had not been evaluated, other than with reference to The Dania Corporation's original cost of acquisition two years earlier, and no valuation had been made as to The Dania Bank itself. The district court's order confirming the sale of stock did not find that an "emergency" existed so as to necessitate the rapid disposition of said stock.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below in the instant case is in direct conflict with the decision of the United States Court of Appeals for the Third Circuit in *In re Solar Mfg. Corp.*, 176 F.2d 493.

In *Solar*, a petition for re-organization was filed pursuant to Chapter X of the Bankruptcy Act. The district court approved "the sale of virtually all of the assets . . ." of the debtor corporation. The sale was not "in pursuance of an approved plan . . ."

In reversing the order approving the sale, the Third Circuit, after stating that Section 116(3) of the Bankruptcy Act, 11 U.S.C. § 516(3) provided for the sale of assets "not in pursuance of a plan of re-organization", and that such a sale was "not surrounded by the rather elaborate safeguards which the Congress has provided", held:

> "We think that sales under court order not in pursuance of a reorganization plan are to be

> confined to emergencies where there is imminent danger that the assets of the ailing business will be lost if prompt action is not taken.
>
> * * *
>
> "We are saying that the safeguarding provisions of Chapter X are not to be ignored in the sale of the assets of a business unless an emergency exists." *In Re Solar Mfg. Corp.*, 176 F.2d at 494, 495

In the instant case, as pointed out in the Statement, and as recognized by the Fifth Circuit, "no plan for reorganization had been presented to the Court at the time" that the district court approved the sale of stock owned by the debtor. The district court made no finding of the existence of an "emergency" calling for the disposition of the debtor's sole asset not pursuant to a plan of reorganization.

The Fifth Circuit held that a district court, in its discretion, after approving a petition for reorganization, may order the sale of all or part of a debtor's assets.

> "There is no requirement that a plan for reorganization must be submitted, nor even that the sale be in aid of reorganization, or that it await a liquidation in straight bankruptcy." Appendix, pp. 6-7.

As to the applicability of *Solar*, the Court stated:

> "Appellant argues that a sale of assets under Section 116 is justified only where an emergency situation is present, involving imminent danger

> of the loss of these assets, if not promptly sold. As authority for this position, it cites the case of *In re Solar Mfg. Corp.*, 176 F.2d 493 (3 Cir. 1949). However, it must be noted that Section 116 authorizes such sales to be made within the sound discretion of the Court 'upon cause shown'. The statute makes no reference to the necessity or (sic) an impending emergency. Furthermore, the weight of authority in the various circuits is that Section 116 sales are proper where there is justifiable cause present, and where the sale is in the best interest of the debtor and the majority of the creditors." Appendix, p. 7.

Petitioner respectfully submits that the decision in the instant case and in *Solar* are patently in conflict. The Fifth Circuit directly rejected the premise, reasoning and result of the Third Circuit. *See, In re Pure Penn Petroleum Co.*, 188 F.2d 851 (C.A. 2).

2. The decisions in the instant case are in conflict with the principals set forth by this Court in *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, ... U. S. ....., 20 L.Ed. 2d 1, (hereinafter "TMT") and present important questions concerning proceedings under the Bankruptcy Act.

TMT presented two broad questions. One concerned the compromise of claims against a debtor in a re-organization proceeding. The other involved the approval and confirmation of re-organization plans with particular reference to the "value of the re-organized company."

The district court had found the debtor to be insolvent. In reaching this conclusion, the court "recognized that going concern value, not book or appraisal value, must govern determination of the fairness of the plans of reorganization . . ." *TMT*, 20 L.Ed. 2d at 20. However, in applying this standard,

> "the District Court did not have before it all the evidence and testimony relating to the future problems and prospects of the company which were necessary to assess its value as a going concern. Indeed, the trial judge steadfastly refused to consider the value of the company once it was out of reorganization proceedings," *TMT*, 20 L.Ed. 2d at 21.

Past and present operations of the debtor were considered in determining the debtor's value as a going concern.

The valuation question posed by the present case does not concern a plan of reorganization per se for several reasons which precluded the case from reaching that point. First, when the district court approved the sale of the debtor's sole asset, no plan had been presented. Second, the approval of the sale made a plan of re-organization moot as to the debtor Dania Corporation since it had been, for all practical purposes, liquidated.

When the sale of the debtor's sole asset was proposed, the following matters had been presented to the court:

1. In October, 1964, the debtor had acquired the stock to be sold for approximately 4.18 million dollars (R.20, 271).

2. In April, 1966, the receiver accorded the same valuation to said stock (R. 290), noting that he had "not made a detailed investigation into the evaluation of the Dania Bank's stock inasmuch as such valuation would of necessity require expert assistance as to the status of the Dania Bank's internal affairs and management and evaluation of the collectability of outstanding loans. At this time, such a study is not essential for the purposes of this report." (R. 288-289). No such study was ever undertaken.

3. In July, 1966, the trustee (formerly the receiver), in reporting the stock's value, stated that it "was not established by computation of book value or by market value on a bid and asked basis." The "value" was predicated upon acquisition cost and interest paid thereon by the debtor. (R. 346-47)

4. In the same report, the trustee recommended that the bank stock "be liquidated in a careful manner so as not to disturb the banking institutions involved. Your trustee can make no recommendation at this time as to whether or not a sufficient return would be available to the estate involved in the disposition of these assets to discharge in full all indebtednesses due and owing to the secured creditors on principal and accured (sic) interest. It therefore may be necessary to undertake evaluation proceedings in accordance with Section 197 of the Acts of Congress relating to Bankruptcy [11 U.S.C.A. § 597]". (R. 357)

5. On January 3, 1967, the Trustee, in his "Report Concerning Reorganization" advised the court of the proposed sale of stock. (R. 367-68)

6. On the same date, seeking the entry of a rule to show cause in connection with a declaration of no equity for stockholders, the trustee, in alleging that no equity existed, referred to "*the present status of the value of the pledged collateral as confirmed by the offer*" of the purchaser. (R. 382) (Emphasis added)

7. On January 6, 1967, the trustee, in seeking a rule to show cause in connection with the proposed sale, alleged (a) that since March, 1966, the Dania Bank had neither declared, distributed or paid dividends on its stock; (R. 395-96) (b) that the interest accumulating on loans secured by the stock to be sold was "burdensome"; (R. 396) (c) that the appeals which had been entered by the proposed purchaser of the stock, and which were to be dismissed as part of the consideration thereof "will be costly and expensive and burdensome"; (R. 396-97) and, (d) by virtue of the sale, the "Debtor in these consolidated proceedings will realize a far greater distribution than could be paid if the assets of the Dania Corporation, a Debtor, in these consolidated proceedings would be abandoned to secured creditors. (It appearing to the Trustee that an evaluation of the collateral held by said secured creditors would result in said creditors retaining the stock of the Dania Bank pledged as security for the respective loans, and further for a portion of their respective indebtednesses declared as unsecured.)" (R. 398-99) The trustee concluded:

> "Your Petitioning Trustee does represent to this Court that by virtue of the daily accurals (sic) of indebtednesses experienced by the instant estate, and the failure of the estate to receive any dividends on the stock it holds of the Dania Bank

> to offset said accruing charges, the burdensome nature of the indebtedness is apparent." (R. 399)

8. On the same date and predicated upon the foregoing, the district court stated:

> [I]t appear[s] that it is to the best interests of the estates in these consolidated proceedings, and it further appear[s] that the assets of the Dania Corporation, a Debtor in these consolidated proceedings, are severely encumbered as to make such assets a burden upon the estate, and further in effect to retard any plan of reorganization that may be promulgated, or in fact bar such plan of reorganization, and it further appear[s] that it would be for the best interest of the estate in these consolidated proceedings that said offer should be accepted by the Trustee . . ." (R. 389)

9. On January 31, 1967, the proposed sale was approved. The court found that Inter National Bank's suggestion that its stock (4,680 shares) be included in the proposed sale "fortify the Trustee's recommended sale in that they directly acknowledge the terms, conditions and price for the sale of the stock are so advantageous that the Inter National Bank of Miami desires its stock to be included in such sale. It, therefore, appears that the Trustee has adequately performed his duty in obtaining an offer for the purchase of 124,560 shares of The Dania Bank stock under the terms, conditions and selling price most favorable and advantageous to the Debtor." (R. 463-64) The court further found "the written offer of Investment Securities Corp., as purchaser, attached to the petition of the said Trustee and accepted by the Trustee sub-

ject to this Court's approval, is a fair and reasonable offer for 124,560 shares of the capital stock of The Dania Bank, and that it is to the best interests of the Debtor's estate to approve the said sale." (R. 464-65)

This Court, in *TMT*, in a directly related context, held that in determining value, the lower court erred in failing to consider *future* prospects. In the present case, the lower court did not remotely take into consideration the matters which *were* considered, and held inadequate, in *TMT*. Here, the condition of The Dania Bank itself had not been explored, *i.e.*, its past, present and future position as an income generating asset as a part of a plan of reorganization. Other than relying on original acquisition cost, by the Trustee's own admission, the stock to be sold was not evaluated on the basis of book or market value. (Petitioner would point out that when the district court authorized the rejection of "executory contracts" and vested the pledged securities in their pledgees, approximately 50,000 shares, he permitted those parties to sell the shares awarded them "at a price no less than the market price as evidenced by three offers and three bids in the open market on the date of said sale." (R. 438, 446-47, 453) No such condition was placed upon the trustee when he sold 124,560 shares.

The "accumulating interest" was found to be "burdensome" in a vacuum—*i.e.*, it was not placed in perspective with reference to the stock's value, the condition of The Dania Bank and its value or as part of a plan of reorganization. In this context, the accrual of interest was meaningless.

Similarly, the failure of the bank to pay dividends in a nine-month period mattered not in and of itself. No evidence was offered to establish the reason for the *alleged* cessation of dividends nor the likelihood of the payment thereof being resumed. Surely, Garvice D. Kincaid, in acquiring stock he had sold two years before, would not rationally purchase controlling interest in a bank which had ceased paying dividends and which was of questionable value, if in fact this was the bank's status.

Kincaid's pending appeals were characterized as costly, expensive and burdensome, without any showing to support these conclusions. See *TMT*, 20 L.Ed. 2d at 15. The district court found that petitioner's response and argument "fortify" the recommended sale and acknowledged that said sale was "so advantageous" that it wished to have its shares sold on the same basis. Thus *a fortiori*, the district court found, the Trustee had adequately performed his duty, for the terms and selling price of the offer were most favorable and advantageous. And, the court concludes, the proposed sale is "fair and reasonable" and in the debtor's "best interests."

The principles set out in TMT were given absolutely no application in the present case. One may search the entire record herein without finding evidentiary support for the order in question, without finding a scintilla of *fact* demonstrating "cause shown" (11 U.S.C. 516(3)).

> "It is essential, however, that a reviewing court have some basis for distinguishing between well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and merely boiler plate approval phrased in appro-

> priate language but unsupported by evaluation of the facts or analysis of the law." *TMT*, 20 L.Ed. 2d at 15.

The total absence of evidentiary support for the district court's order found its way into the Fifth Circuit's opinion. Thus, the court referred to: "the *questionable market value* of Dania Bank stock held by the debtor was *deteriorating rapidly* and the *estate's equity therein was diminishing daily*"; "but the *sale of the debtor's assets became necessary* some eight months . . ." after the petition had been filed; and, "*just cause* shown to warrant the sale of these shares of stock for the reasons given . . ." Appendix, pp. 5-7. No evidence was submitted as to market value or the deterioration thereof, the necessity for the sale of assets or "just cause."

Inter National Bank respectfully submits that the foregoing does not concern simply an evidentiary question. Rather, the present case portrays litigation under Chapter X totally inconsistent with and contrary to this Court's views and directives, and the statutory requirement of "cause shown". It is a case which, if permitted to stand, presents serious hazards to persons involved in re-organization proceedings for here, the court permitted the virtual liquidation of a debtor in reorganization when it approved the sale of the debtor's sole asset without *evidence* as to the *asset's* value, the *debtor's* past, present and future potential, or the feasibility of a plan of reorganization which included the asset. In short, on the basis of *allegation* alone, the court approved the transfer of property for approximately four million dollars. This does not provide a basis for "an informed and independent judgment . . ." *TMT*, 20 L.Ed 2d at 16

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 24638

In re THE DANIA CORPORATION,
Debtor.

INTER NATIONAL BANK OF MIAMI,
Appellant,

vs.

J. H. BROCK, Trustee in Reorganization,
Appellee.

Appeal from the United States District Court for the Southern District of Florida

(September 17, 1968)

Before BROWN, Chief Judge, CLAYTON*, Circuit Judge, and SCOTT, District Judge.

SCOTT, District Judge: This is an appeal from two orders of the District Court issued pursuant to Chapter X of the Bankruptcy Act, 11 *U.S.C.A.* §§501-676.

The first order appealed from confirmed the sale of 124,560 shares of Dania Bank stock owned by the debtor. The second order directed the rejection of an

*Judge Clayton heard oral argument but on account of illness was unable to participate in the consideration or decision of this case.

executory contract between the debtor and appellant. The District Judge's authority for ordering the sale and the rejection of the contract is in Section 116 of the Bankruptcy Act, 11 *U.S.C.A.* §516.

The debtor, The Dania Corporation, is the corporate owner and holder of 174,893 shares of stock of The Dania Bank of Dania, Florida. This stock represents approximately 80% of the stock issue of The Dania Bank. It comprises the major asset of the debtor.

On July 23, 1965, The Wingreen Company made a note for $100,000.00 payable to the Inter National Bank, evidencing a loan made to Wingreen by the appellant bank. At the same time Dania Corporation pledged 4,680 shares of Dania Bank stock to the Inter National Bank as collateral for the loan made to Wingreen and signed a hypothecation agreement to make the stock available as collateral.

On January 25, 1966, The Dania Corporation filed a voluntary petition for reorganization under Chapter X. The petition was approved by the District Court as being filed in good faith and a trustee was appointed. Thereafter, Dania's petition was consolidated with the petitions for reorganization which had been filed by The Wingreen Company and The Lake Worth Company. The Court ordered the consolidation because of the close relationship between these three companies.

After the approval of Dania's petition, the trustee petitioned the Court for the entry of a rule to show cause as to why he should not be allowed to dispose of 124,560 shares of Dania Bank stock in accordance with the terms

of an offer submitted by Investment Securities Corporation. He simultaneously petitioned for a rule to show cause why he should not be allowed leave to abandon various executory contracts involving stock pledges of Dania Bank stock. One of the contracts which the trustee sought to have rejected was the note in question here, i.e., the note between Wingreen and the Inter National Bank which was secured by 4,680 shares of Dania Bank stock owned by the debtor. The District Court entered both rules to show cause. After a hearing the order of sale and the order rejecting the executory contract were also entered. No plan for reorganization had been presented to the Court at the time these two orders were entered. The question before us is whether the District Judge properly exercised his authority to enter these orders.

I.

Appellant challenges the District Court's authority to order the sale of the stock in question on the grounds that the order was entered before any reorganization plan had been considered, before any evaluation of the assets had been undertaken and when no emergency situation existed to warrant a sale under Section 116 of the Act. Appellant contends that the sale of this stock, which is the major asset of the debtor, would be tantamount to an ordinary bankruptcy liquidation which is not contemplated by a Chapter X proceeding except upon the failure of the reorganization plan.

Section 116 of the Act provides:

"Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties

> in this chapter conferred and imposed upon him and the Court — * * * authorize * * * a trustee, * * * upon such notice as the judge may prescribe and upon cause shown, to * * * sell any property of the debtor, whether real or personal, upon such terms and conditions as the judge may approve * * *." (11 U.S.C.A. §516)

The question of the power of the District Court to order the sale depends upon the circumstances at the time of the issuance of the Court's order on January 19, 1967. This was before submission of any reorganization plan to the Court and approximately eight months after the approval of the petition.

The debtor in these consolidated proceedings under Chapter X held 174,893 shares of the common stock of The Dania Bank, a state bank incorporated under the laws of the State of Florida to conduct a banking business. The Court had already found there was no equity for stockholders of Dania Corporation in the bank stock.

On December 31, 1966, the debtor owed $5,330,634.29 principal on obligations involving the pledging of all of The Dania Bank stock it held. The obligations were collateralized on a primary and secondary basis, and had earned interest as of December 31, 1966, in an amount of $258,238.71, or a total outstanding indebtedness of principal and interest as of December 31, 1966, of $5,588,873.00.

Interest was accruing daily and the stockholdings of the debtor were subjected to collateral pledges involving the Florida National Bank of Jacksonville, the Citizens

National Bank of Orlando, the United Security Life Insurance Company, Garvice D. Kincaid, the Lexington Finance Corporation, the Inter National Bank of Miami and the American National Bank of Jacksonville, Florida.

The Dania Bank advised the trustee, who advised the Court, that payments of dividends on the stock issued by The Dania Bank were suspended. The questionable market value of Dania Bank stock held by the debtor was deteriorating rapidly and the estate's equity therein was diminishing daily. In addition, a challenge had been lodged by Garvice D. Kincaid on behalf of himself and the Lexington Finance Corporation seeking to reclaim some $31,000.00 from the trustee, the last dividends paid by The Dania Bank on its stock in March of 1966. (The sum sought to be recovered by Kincaid was the dividends paid on the 124,560 shares of Dania Bank stock upon which Kincaid and/or Lexington Finance Corporation held collateral security of a secondary nature.) Added to that claim were appeals addressed to two orders, the defense of which would have caused the estate to experience administrative expenditures. Out (sic) of the orders denied the motions to vacate the order of consolidation. The other approved the debtors' petition for reorganization under Chapter X, found good faith and appointed a trustee.

The Court properly exercised its statutory power to order the challenged sale. Section 116 of the Act empowers the Court to authorize the trustee to sell any property of the debtor, for cause shown, upon such terms and conditions as the Judge may approve. This power may be exercised any time after the Court has approved the debtor's petition for reorganization. The power may be utilized in the sound discretion of the District Judge; and

the Appellate Court is not at liberty to substitute its judgment for that of the District Judge unless there is an abuse of discretion. *Marathon Foundry and Machine Co. v. Schwartz*, 228 F. 2d 594 (7 Cir. 1956).

Appellant cites the case of *Fidelity Assurance Assn. v. Sims*, 318 U. S. 608 (1943), for the proposition that the sale of the major portion of the assets of a debtor is impermissible in a Chapter X proceeding except upon failure of the reorganization plan. However, a close reading of that opinion shows it to be not applicable here. It holds that a reorganization petition should be dismissed as not being filed in good faith where liquidation, and not a readjustment of the rights of creditors, was the only possibility at the outset. *The Fidelity Assurance Assn.* case does not apply here, where the petition was in fact filed in good faith at the inception, with a view toward corporate reorganization, but the sale of the debtor's assets became necessary some eight months later.

After a petition has been approved, the District Court may exercise its discretion in ordering the sale of all or of a portion of the assets of the debtor. There is no requirement that a plan for reorganization must be submitted, nor even that the sale be in aid of reorganization, or that it await a liquidation in straight bankruptcy. Furthermore, Section 102 of the Act (11 *U.S.C.A.* §502) renders an appraisal of the assets in Chapter X proceedings unnecessary unless the Court has ordered the instigation of bankruptcy proceedings. *In re Sire Plan, Inc.*, 332 F. 2d 497 (2 Cir. 1964); *In re V. Loewer's Gambrinus Brewery Co.*, 141 F. 2d 747 (2 Cir. 1944).

Appellant argues that a sale of assets under Section 116 is justified only where an emergency situation is

present, involving imminent danger of the loss of these assets if not promptly sold. As authority for this position, it cites the case of *In re Solar Mfg. Corp.*, 176 F. 2d 493 (3 Cir. 1949). However, it must be noted that Section 116 authorizes such sales to be made within the sound discretion of the Court "upon cause shown". The statute makes no reference to the necessity or (sic) an impending emergency. Furthermore, the weight of authority in the various circuits is that Section 116 sales are proper where there is justifiable cause present, and where the sale is in the best interest of the debtor and the majority of the creditors. *See e.g., In re Sire Plan, Inc., supra; Marathan Foundry and Machine Co. v. Schwartz, supra; In re V. Loewer's Gambrinus Brewery Co., supra.*

Collier describes the use of Section 116 sales as follows:

> "* * * under §116(3) if the facts impel a decision that the debtor's property be sold prior to the working out of a reorganization plan, the judge may authorize the sale to be made. And even if such disposition involves all the income-producing property of the debtor, the order may be justified. Section 116(3) says 'any property of the debtor, whether real or personal', and even though the sale may practically prevent the adoption of a reorganization plan and thus defeat the purpose of the proceeding, it may be permitted where conditions warrant. There is no inconsistency in this result. True, as we have said, the goal of Chapter X is rehabilitation not liquidation. But some play must be followed for the joints of the machine. A rigid denial of the right

> to sell or lease to the fullest extent necessary would prove ruinous to creditors and stockholders where the situation called for that action." 6 *Collier, Bankruptcy* 625 (14th ed. 1965).[1]

We find that the District Court properly ordered the sale of this debtor's assets under the circumstances outlined in its findings of fact. Even if no "emergency" situation existed here, as that word is normally used, there was certainly just cause shown to warrant the sale of these shares of stock for the reasons given by the District Judge in his finding of fact number 20.[2] This is all that is required by the statute.

Appellant's final attack on the order of sale is grounded upon the assertion that the order amounted to a denial of property without due process. Appellant urges that the order converted its holding of a marketable portion of a control interest into a mere minority interest in a closed corporation, thus rendering its collateral unmarketable. We find no merit in this contention, because the rule is well settled that even though a reorganization proceeding may cause the diminution in value of a secured creditor's collateral, the proceedings under the Act

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[1] See 6 *Collier, Bankruptcy* 626, n. 25 (14th ed. 1965), for a criticism of *In re Solar Mfg. Corp., supra.*

[2] "20. That the consummation of the sale as proposed by the Trustee would realize substantial equity to the Debtor and, in turn, be of substantial benefit to the Debtor's creditors in that under the proposed sale:
"(a) The Debtor's estate would retain $31,140.00 received as dividends on 124,560 shares of The Dania Bank stock now subject to the claim of Lexington Finance Company;
"(b) The Debtor's estate would receive an additional $75,000.00 cash;
"(c) The Debtor's estate would be relieved of a burdensome debt exceeding the amount of $3,923,440.00 on which interest is accumulating daily; and
"(d) The Debtor's estate would be relieved of the costs and expense of defending presently pending appeals."

are not thereby unconstitutional. *Continental Ill. Nat. Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648 (1935); *Campbell v. Alleghany Corp.*, 75 F. 2d 947 (4 Cir. 1935).

II.

It is the position of appellant that the District Court erred in ordering the rejection of the contract between The Dania Corporation and appellant, whereby appellant lent The Wingreen Company $100,000.00 which was secured by a stock pledge of 4,680 shares of The Dania Bank stock owned by The Dania Corporation.

Section 116(1) of the Act (11 *U.S.C.A.* §516 (1)) authorizes the District Judge to reject any *executory* contract of the debtor, except contracts in the public authority. The Court may enter such an order any time after the approval of the debtor's petition for reorganization. Appellant argues that the note in question was not executory in nature, but was an executed contract.

The matter of whether the contract was executory in nature or executed is reserved for further determination by the Chapter X active judge panel. The action of the District Court is affirmed as to the prior issues in Part I.

AFFIRMED IN PART, DECISION RESERVED IN PART.

ORDER CONFIRMING SALE AND AUTHORIZING TRANSFER OF TRUSTEE'S INTEREST IN AND TO 124,560 SHARES OF DANIA BANK STOCK

App. 10

(NUMBER AND TITLE OMITTED)

(Filed: January 31, 1967)

On the 6th day of January, 1967, the Trustee, J. H. BROCK, did petition this Court for the entry of an Order in the nature of a Rule to Show Cause why the Trustee should not sell and transfer 124,560 shares of the common capital stock of the Dania Bank to Investment Securities Corp., a Florida corporation, and in accordance with the offer to acquire and purchase said 124,560 shares of the said capital stock of the Dania Bank to execute various and sundry agreements and in effect, to sell, assign and transfer the estate's equity in and to said 124,560 shares of the common capital stock of the Dania Bank held by the Dania corporation, a Debtor in these consolidated proceedings.

In accordance with said Petition, this Court entered its Rule to Show Cause thereon, which was served in accordance with the requirements of service contained in said Rule, on all parties designated to receive such service, and further, notice of the Return Date and Hearing to be held in accordance with the provisions of said Rule to Show Cause was had on all parties materially and adversely affected by these proceedings, and upon the status of the instant record and on all of the proceedings and hearings held in these consolidated proceedings, and Inter National Bank of Miami being the sole objector to the Trustee's Petition to sell said 124,560 shares of the common capital stock of the Dania Bank and said objector in Open Court, through its attorney, having presented argument but no testimony or other evidence, and the Court being fully advised in the premises, does find:

FINDINGS OF FACT

1. That on January 25, 1966, this Court entered its Order consolidating the hereinafter enumerated causes to be administered as a consolidated cause:

a. THE WINGREEN COMPANY, a Florida corporation, Debtor, case No. 66-28;

b. THE DANIA CORPORATION, a Florida corporation, Debtor, case No. 66-29;

c. THE LAKE WORTH COMPANY, a Florida corporation, Debtor, case No. 66-30.

On May 4, 1966, this Court entered its Order denying Motions addressed to vacate the Order of consolidation previously entered.

On May 23, 1966, this Court entered its Order approving the Debtors' Petitions for reorganization under Chapter X, including a finding of good faith, and did appoint J. H. BROCK, Trustee of THE WINGREEN COMPANY, Debtor, THE DANIA CORPORATION, Debtor and THE LAKE WORTH COMPANY, Debtor.

1. That these instant proceedings since January 25, 1966 are consolidated proceedings and the assets herein are administered on a consolidated basis.

2. By virtue of these proceedings, the Court has jurisdiction over the subject matter and the parties hereto.

3. That with the exception of the Inter National Bank of Miami, none of the parties who received service as

designated interested parties materially and adversely affected by these proceedings entitled to receive service, have filed any responsive pleadings to the Petition upon which the Rule to Show Cause dated January 6, 1967 did issue, nor did any of the parties, with the exception of the Inter National Bank of Miami, file any reply to the Rule to Show Cause issued January 6, 1967.

4. That this Court has previously entered its Order decreeing that no equity assets (sic) for any stockholders of the common capital stock of the Dania Corporation (nor any equity for parties collaterally claiming an interest in the stockholders' rights in and to the said stock held by said stockholders of stock.

5. On August 3, 1966, Garvice D. Kincaid, as nominee and agent for Lexington Finance Company, and Lexington Finance Company, a corporation organized under the laws of the State of Kentucky, did file its proof of claim (alleging security) in an amount of $737,059.17, together with interest thereon at the rate of 5¾% per annum and reasonable attorney's fees. Said proof of claim alleged a second lien on 124,560 shares of the common capital stock of the Dania Bank, said proof of claim being assigned No. 274 D.

6. The Florida National Bank at Jacksonville is a secured creditor in an amount of $2,855,250.00 (representing principal in the amount of $2,700,000.00 and interest as of December 31, 1966 in an amount of $155,250.00), and that the said Florida National Bank of Jacksonville does hold as security for the repayment of said indebtedness 114,000 shares of the capital stock of the Dania Bank.

7. That the Citizens National Bank of Orlando is a secured creditor in a total amount of $288,750.00 (said indebtedness consisting of $275,000.00 principal and interest as of December 31, 1966, $13,750.00), the repayment of which indebtedness is secured by a pledge of 10,560 shares of the common capital stock of the Dania Bank.

8. That on March 4, 1966, the Dania Bank declared a dividend of 25 cents per share payable March 15, 1966, and did, in fact, pay said dividend to J. H. BROCK, the Trustee, on 124,560 shares of the common capital stock of the Dania Bank, said dividend totaling $31,140.00.

On or about March 29, 1966, Garvice D. Kincaid, did make and file his claim to said dividends and the Trustee, by and through his attorney, did, on April 5, 1966, respond to said claim to dividends heretofore filed by the said Garvice D. Kincaid, and that said matter was in issue.

On October 24, 1966, the deposition of the said Garvice D. Kincaid was taken and had in these proceedings and filed accordingly.

9. GARVICE D. KINCAID, as nominee and agent for Lexington Finance Company, and LEXINGTON FINANCE COMPANY, did file for joint Appeal on June 3, 1966 addressed to the Order entered by the Honorable W. O. Mehrtens, U. S. District Judge, dated May 4, 1966 and filed May 5, 1966, entitled Order Denying Motions to Vacate Order of Consolidation, and did further file their Notice of Appeal from the Order of the Honorable W. O. Mehrtens dated May 23, 1966, and filed May 24, 1966, entitled Order Approving Debtors' Petition for Re-

organization under Chapter X — Finding of Good Faith and Appointing Trustee, and in addition thereto, did file their Notice of Appeal dated July 1, 1966 from the Order entered by the Honorable W. O. Mehrtens dated June 3, 1966 and filed June 3, 1966, entitled Order Approving Final Reports of Respective Receivers and Awarding Fees to the Receivers and Their Attorneys, said three Appeals being addressed to the U. S. Court of Appeals, Fifth Circuit.

That said Appeals were perfected by the filing of statement of points on Appeal and directions to the Clerk of the U. S. District Court designating by Stipulation parts of the record to be transmitted. That in addition thereto, Motions to extend time for the filing of the record on Appeal and docketing the Appeal were filed and Orders obtained thereon; directions to the Reporters to prepare the necessary transcripts were also had and transcripts of the proceedings subjected to the foregoing Notices of Appeal were completely transcribed.

10. That THE WINGREEN COMPANY, a Debtor in these consolidated proceedings, by and through the Trustee, J. H. BROCK, is an unsecured creditor in an amount of $520,000.00 plus accrued interest.

11. That 100 shares of the capital corporate stock of the Dania Corporation, Debtor in these consolidated proceedings, are listed and registered in the names of Mr. and Mrs. BURTON D. GREENFIELD and 100 shares of the capital corporate stock of the Dania Corporation, Debtor in these consolidated proceedings, are listed and registered in the names of Mr. and Mrs. DANIEL I. WINCOR. Said aforementioned party stockholders, by virtue of

this Court's previous Order, do not possess any right, title interest, legal or equitable, in said shares.

12. That the Dania Corporation, a Debtor in these consolidated proceedings, was possessed of one sole asset subject to the hereinbefore and hereinafter enumerated encumbrances, to-wit: 174,893 shares of the capital corporate stock of the Dania Bank. However, this Court has previously entered its Order authorizing the Trustee to reject the executory contracts involving the Inter National Bank of Miami, the American National Bank of Jacksonville and United Security Life Insurance Company; thus, the only sole and remaining asset of the Dania Corporation, a Debtor in these consolidated proceedings, is 124,560 shares of the common capital stock of the Dania Bank.

The stock, subject to the rejected executory contracts, totaled 50,333 shares in number, which were subjected to a purchase agreement with United Security Life Insurance Company (40,653 shares) for which an unpaid balance of the purchase price totaled $1,321,549.00 plus accrued interest; 5,000 shares were subject to a pledge agreement with the American National Bank of Jacksonville, to secure an indebtedness of $165,000.00 plus accrued interest, and 4,680 shares were pledged to the Inter National Bank of Miami to secure an indebtedness of $100,000.00 plus accrued interest.

13. On December 22, 1966, Investment Securities Corp. offered to purchase 124,560 shares of the common capital stock of the Dania Corporation from the Trustee under the terms and conditions enumerated in said offer, which is attached hereto and made a part hereof as Exhibit "A".

14. On December 27, 1966, the Trustee accepted said offer subject to Court Approval. Attached hereto is Exhibit "B" and made a part hereof is said conditional acceptance.

15. On January 6, 1967, the Trustee filed his petition for the entry of a Rule to Show Cause why the offer of Investment Securities Corp. should not be presented to the reorganization Court for confirmation and approval, and in response to said Petition, this Court did on January 6, 1967, issue its Rule to Show Cause.

16. That all parties materially and adversely affected by these proceedings and such other parties did receive adequate and complete notice in accordance with the provisions of the Acts of Congress relating to Bankruptcy, and in accordance with the provisions of the Rule to Show Cause, and that the publication of the Rule to Show Cause, as provided for therein, was had, a proof of said publication having been filed heretofore in these consolidated proceedings.

17. The Response filed by Inter National Bank of Miami appears, on its face, to be without merit and unreasonable in that said Bank admittedly would not object to the sale if the stock held by said Bank as collateral was included in the sale in order that the debt to the said Bank would be paid. The Bank apparently desires only to have its stock included in the proposed offer. It is also apparent that the proposed offer does not extend to, nor include, stock held by the Inter National Bank of Miami. The Response of the Inter National Bank of Miami and the argument of its counsel fortify the Trustee's recommended sale in that they directly acknowledge the terms, condi-

tions and price for the sale of the stock are so advantageous that the Inter National Bank of Miami desires its stock to be included in such sale. It, therefore, appears that the Trustee has adequately performed his duty in obtaining an offer for the purchase of 124,560 shares of The Dania Bank stock under the terms, conditions and selling price most favorable and advantageous to the Debtor. It further appears from the record herein that if the Court approves the sale to Investment Securities Corp., Inter National Bank of Miami will not be affected in any material manner with respect to its position and its collateral. The status of the said Bank and its collateral before the commencement of these proceedings will, in the opinion of the Court, remain the same. It further appears from the record that the debt held by the Inter National Bank of Miami was originally an unsecured debt when made on or about July 23, 1965, and was not secured until on or about October 24, 1965, at which time the said Bank received a pledge of 4,680 shares of The Dania Bank stock. The rights of the said Inter National Bank of Miami have never been more than to be secured by 4,680 shares of The Dania Bank stock, and the value of the said security has never been more than whatever the said number of shares might sell for from time to time in the market.

18. That the attorney for Investment Securities Corp. has advised the Court that the Commissioner of Banking for the State of Florida has approved the acquisition by his client of 124,560 shares of capital stock of The Dania Bank and authorized the consummation thereof.

19. The written offer of Investment Securities Corp., as purchaser, attached to the petition of the said Trustee and accepted by the Trustee subject to this Court's approval, is a fair and reasonable offer for 124,560 shares

of the capital stock of The Dania Bank, and that it is to the best interests of the Debtor's estate to approve the said sale.

20. That the consummation of the sale as proposed by the Trustee would realize substantial equity to the Debtor and, in turn, be of substantial benefit to the Debtor's creditors in that under the proposed sale:

(a) The Debtor's estate would retain $31,140.00 received as dividends on 124,560 shares of The Dania Bank stock now subject to the claim of Lexington Finance Company;

(b) The Debtor's estate would receive an additional $75,000.00 cash;

(c) The Debtor's estate would be relieved of a burdensome debt exceeding the amount of $3,923,440.00 on which interest is accumulating daily; and

(d) The Debtor's estate would be relieved of the costs and expense of defending presently pending appeals.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter.

2. That in accordance with the applicable provisions of Chapter X of the Bankruptcy Act, this Court has jurisdiction to entertain the instant matter and specifically, can enter an Order to sell any property of the Debtors in these consolidated proceedings under such terms and

conditions as the Court deems fit and proper, directing the Trustee to utilize procedures to effectuate said sale [Section 116(3) of the Bankruptcy Act 11 U.S.C.A. § 516 (3)].

3. That the notice given to all parties interested in this specific matter, and all parties materially and adversely affected by these reorganization proceedings, was sufficient and in accordance with the jurisdiction of this Court as to the notice to be prescribed. [Section 116(3) of the Bankruptcy Act - 11 U.S.C.A. § 516 (3)].

4. That all parties designed as respondents by the Rule to Show Cause dated January 6, 1967, with the exception of Inter National Bank of Miami, having failed to file responses or replies to said rule and to the Petition upon which said Rule issued or (sic) deemed to have waived any objections that they may have or may have had to the entry of this instant Order authorizing the transfer of the Trustee's interest in and to 124,560 shares of the common capital stock of the Dania Bank, and this Court has jurisdiction to rely upon the status of the record and all previous proceedings and hearings had in these consolidated proceedings to make its determination.

5. That the response and objection of Inter National Bank of Miami filed herein is a sham and without foundation of merit in fact and the legal differences are fictitious, specifically, the reliance upon Equal Protection under the Fourteenth Amendment of the U. S. Constitution. The Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States is not applicable in Federal matters. It is a restriction; it has exclusive reference to State action in the Legislative, Exe-

cutive, or Judicial field [*Virginia v. Rives*, 100 *U.S.* 313 *at* 318, 25 *L.Ed. S. Ct.* 667 (1880); *Minneapolis Railway Co. v. Beckwith*, 129 *U.S.* 26 *at* 28 *and* 29; 9 S. Ct. Reporter 207 (1889); *Snowden v. Hughes*, 321 *U.S.* 1 *at* 8; 64 S.Ct. 397 (1944)].

ORDER

The Court being fully advised in the premises, and after having heard argument, it is thereupon

ORDERED:

(1) That the terms, conditions and purchase price contained in the firm proposal of Investment Securities Corp. dated December 22, 1966 to J. H. BROCK, Trustee of The Dania Corporation for the purchase of 124,560 shares of the common capital stock of The Dania Bank, be and the same are hereby approved.

(2) J. H. BROCK, Trustee of the Dania Corporation, upon receipt of the purchase price and all releases and documents to be furnished, be and he hereby is authorized and directed to sell, transfer and assign the 124,560 shares of the common capital stock of The Dania Bank referred to in said proposal to Investment Securities Corp., subject only to: (a) The obligation and lien of the Florida National Bank and Trust Company of Jacksonville, Florida; (b) The obligation and lien of Citizens National Bank of Orlando, Orlando, Florida; and (c) The obligation and lien of Garvice D. Kincaid, as Agent for Lexington Finance Company; otherwise said stock is sold free and clear, and any and all liens or claims thereto are hereby transferred to the proceeds of such sale.

(3) J. H. BROCK, as Trustee, be and he is hereby authorized and directed to execute releases, bills of sale, stock powers and all other agreements or documents as provided in said offer or as may be necessary to be executed and delivered to close and consummate said transaction and place 124,560 shares of stock of The Dania Bank in the name of Investment Securities Corp.; and

(4) The Dania Bank, as Transfer Agent of its stock, be and it is hereby authorized to transfer the said 124,560 shares of common capital stock of The Dania Bank, on the books and records of the said Bank upon the closing and consummation of the sale hereby approved, any restraining order of this Court to the contrary is hereby modified in that respect.

DONE and ORDERED at Miami, Dade County, Florida, this 19th day of January, 1967.

s/ W. O. MEHRTENS
UNITED STATES DISTRICT JUDGE